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# The "Estate Planning" Interviewer

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J. K. LASSER'S

# Estate Tax Techniques

*—INTRODUCTION: PART II—*

# THE "ESTATE PLANNING" INTERVIEWER

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It has seemed to me, as I formulate and undo and reformulate an analytical structure for the lawyer-client relationship in "estate planning," that professional consultation passes through and around four functional phases:

***Interviewing:*** In a product-oriented analysis (What do we turn out?), interviewing is the acquisition of facts; in interpersonal terms (What are we doing to one another?), interviewing is interaction between a person who wants information and a person who is willing to provide it.

***Counseling*** (in a narrow sense of that word): The counselor provides a climate of freedom, acceptance, and empathy; in that climate a client can make the choices which *he*, not his counselor, needs to make; clients should make these choices for themselves because their human dignity and growth are best served when they do; lawyers should allow clients to make these choices because respect for the person of the client, and even for codified professional ethics, requires that they do so.* *Choices* answer such questions as "Should my wealth be used to care for my wife during her life or should it be given to her?" and "Who should be the guardian of our minor children?"

***Decision-making:*** The client, having provided information and made key choices, needs to decide *what to do about* his choices. When is he dealing with a lawyer (or other "estate planning" professional), he will no doubt ask

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* *Ethical Considerations 7–7 and 7–8, Code of Professional Responsibility:* ". . . The authority to make decisions is exclusively that the client. . . . In the final analysis . . . the lawyer should always remember that the decision whether to forego legally available objectives of methods . . . is ultimately for the client and not for himself."



(Rel.20–9/87 Pub.350)

for legal information, guidance and experience in making those decisions. The activity is therefore a collaborative activity; it is more like a good committee meeting than the counseling session is. "Having chosen to *give* my property to my wife, rather than provide it for her care," for example: "Do I want to provide a management arrangement for her use?" "Having chosen a guardian for our children," for another example: "What should my wife and I do to provide from my wealth for their care and for ultimate disposition to them." Decision-making gives a much more active role to the professional than counseling does. His* expertise and guidance and information are all needed here; but they are relatively useless when the client has tough human *choices* to make.

***Problem-solving:*** Here the choices and decisions have been made and the professional's craftsmanship is called into play. Skill dominates this function, rather than collaboration (as in decision-making) or acceptance, assistance, and companionship (as in counseling). The human issues in problem-solving tend to be issues centering around the professional's ability to be creative and innovative and efficient. Our professional heritage is filled with great problem solvers, and the results of their creativity run from the trust and future interest in the Middle Ages to the variable annuity, the custodial gift, and split-dollar life insurance in this century.

I propose to concentrate on the professional skills involved in gathering facts, and on the skills necessary in performing the *interviewing* function for clients with skill, care, and accuracy. It is important, though, in confining

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* I confess an embarrassment. Most of the people who are really good at "estate planning" interviews—or at least those who come to the task with the fewest obstacles to being effective—are, in my experience, women. I am embarrassed when I find myself referring to such a person as "he" and "him." On the other hand I am a vain writer; I don't like to bog my prose down with awkward phrases such as "he or she" and "herself or himself," nor do I like to foreswear the use of the personal pronoun. My tentative resolution is to be old-fashioned and to use the masculine pronoun for both sexes, in the hope that my readers will agree with me that women are more accustomed to being referred to as "he" than men are at being referred to as "she," but forgive me for experimenting a little.

the scope of this paper to interviewing, to note that the distinctions among these four functions is not a chronological distinction—at least not entirely. A lawyer will normally seek facts before she begins to help the client with choices, but she may not be prescient enough to get them all. Even as late as the problem-solving stage, she may be back to find out facts from the client. And even at that late stage the client may undo some of his choices, so that the process has to begin again at the beginning. Human relationships are not like census forms or trials in court or baseball games. They do not have a necessary order; they are best when free and dynamic.

With that limitation, I propose to discuss several aspects of interviewing—listening skills; the use of questions; things to look for on interviews; principles; nonverbal communication; evaluation; feedback in interviewing; and lawyer presence.

## Listening

Calvin Shrag, the existentialist philosopher, suggests that our non-professional lives in coffee shop, living room, and cocktail party, prepare us poorly for the business of hearing what clients say. "Talk," he says, "is a degenerate form of communication which merely expresses the accepted, average, everyday interpretations of the public. No real content is communicated, and nothing is genuinely understood. All attention is focused on the talking itself, which always uses the conventional cliches. . . ." The point is related, in Shrag's thought, to a moral imperative he borrows from Kierkegaard: "The majority of men are subjective towards themselves and objective toward all others, terribly objective sometimes—but the real task is in fact to be objective towards oneself and subjective toward all others."

This is useful philosophy, but reducing it to skill is not simple. As Dr. Annette Garrett said, "One who frequently interrupts to say what he would have done . . . is not a good listener, but neither is he who sits like a bump on a log. Absence of response may easily seem . . . to reflect ab-

sence of interest." She went on to give a number of suggestions:

(1) Comments and questions "on certain significant features that had not been stressed and might well have been overlooked by an inattentive listener."

(2) A tolerance for silences; "a too hasty interruption may leave [an] important part of the story forever unsaid."

(3) An accepting, un-evaluating attitude.

(4) An atmosphere that encourages expressions of feeling; this may of course get out of hand; "in general," Garrett says, "catharsis through talking is more effective the more the disturbing feeling is related to a fairly recent experience. . . . If a person has had a hairbreadth automobile escape, he feels better if he can talk about it a lot for a while, for then its importance gradually wanes. . . ." An everyday relevant example of "recent experience" in our field is the loss of a loved one, a factor that calls for great patience in "catharsis through talking" as the bereaved person begins to relate his grief to his own death.

(5) Beginning where the client is; "encourage him to talk, . . . listen carefully while he speaks of what is on the 'top' of his mind in connection with the interview." Dr. Garrett continues:

> "Even when our primary interest in a given interview is to obtain the answers to a set of questions, we can profit much from letting the client talk rather freely at first....
>
> "[This] tends to counteract any preconceived ideas about him which the interviewer may have allowed himself to entertain. It gives the interviewer the immense advantage of being able to see the situation and the client's problem from the client's point of view."

## Questions

Questions serve lots of purposes. Often the least of these is to ask for information. Watch two television lawyers in

action in the courtroom (or out of it) and see if you can make some generalizations about (1) the purpose of the questions they ask and (2) what that tells you about how a layman (who writes television scripts) sees the legal profession. Television-lawyer questions are close to a completely wrong technique for interviewing; as Dr. Garrett said, the purpose of an interview question is "to understand and be of assistance."

The interviewee is where he is in order to convey information. The foils of Perry Mason and his current descendents on "L.A. Law" are where they are in order to be put down. "Clients soon recognize the attitudes of their interviewers and tend to respond to the best of their abilities when they feel the presence of a real desire to understand and help." Here are some specific suggestions:

(1) Manner and tone are most likely to convey a desire to help if the interviewer has his feelings together and has decided to be helpful. It is almost impossible to overemphasize the value of self-awareness as a first step in attempting to become aware of and useful to other people.

My dogmas for students in legal counseling are: (a) counseling is a people skill, not a black-letter skill; (b) the best place to learn about people is, as Socrates said, "to know thyself;" and (c) the second best place to learn about people—and a good place to learn about me—is you; it takes two to make one.

(2) Discovery of something the client is not quite aware of is most likely to be accepted by her if the discovery is explained with increased sympathy rather than with one-upmanship, questions are *almost always* a poor way to express discovery.

(3) Probing for no apparent reason is probably received by the client as a threat; "a good general rule," Dr. Garrett says, "is to question for only one of two purposes, to obtain specifically needed information, and to direct the client's conversation from fruitless to fruitful channels."

(4) Expression of the interviewer's dilemma is likely to be more successful than interrogation. If I don't under-

stand what the client has said, I am less threatening when I focus on my reception ("I don't understand that") than when I focus on his inability to be articulate. Questions tend to focus on the client's shortcomings; they tend to imply that the interviewer is superior.

(5) Open-ended questions work better than "cross examination" questions; good questions go after information and not after a score ("yes" or "no" is a score); "even if questions that imply an answer do not result in false answers, they tend to give the impression that the questioner is lacking in fundamental understanding of the situation." Extensive research—some of it half a century old—demonstrates that cross-examination, which may be a good way to catch liars, is a poor way to gather information.

(6) Let the client set the pace; if the interview goes too slowly for the client, he will become bored, and boredom, according to dominant behavioral theory, is a manifestation of anger (anger at the interviewer in this case); if the pace moves too fast for the client, he is likely to experience his own confusion as a rejection of him by the interviewer, which it usually is.

Dr. Alfred Benjamin suggests that the average interviewer uses questions too readily and without considering alternative ways to gather information. "His questions seem to keep him afloat; take them away from him and he will sink." Questions, he says, confuse and interrupt the client; they are often impossible to answer; often the asker doesn't even want an answer, and he doesn't listen when he gets an answer. "However," Dr. Benjamin says, "my greatest objection to the use of questions . . . lies deeper." He continues:

> "If we begin . . . by asking questions and getting answers, asking more questions and getting more answers, we are setting up a pattern from which neither we nor the interviewee will able to extricate himself. By offering him no alternative we shall be teaching him that in this situation it is up to us to ask the questions and up to him to answer them. What is worse, having already become accustomed to this pattern from previous experi-

ence, he may readily adapt himself to it. . . . [H]e will perceive himself as an object, an object who answers when asked and otherwise keeps his mouth closed—and undoubtedly his mind and heart as well.

"By initiating the question-answer pattern we are telling the interviewee as plainly as if we put it into words that we are the authority, the boss, and that only we know what is important and relevant for him.

"[The] unstated assumption . . . [is] that the interviewee submits to this humiliating treatment only because he expects you to come up with a solution to his problem or because he feels that this is the only way you have of helping him. As for you, the interviewer, you have asked your questions and gotten your answers; now show your tricks. If you do not have the solution up your sleeve, if you cannot help after the long third degree, what right had you to ask? What are you good for?"

Dr. Benjamin raises a difficult issue for lawyers—and seems to set an almost impossible standard. He recognizes, though, that we have to ask questions. Ultimately, he says, we must learn to discipline ourselves with a few protective standards:

(1) We should be aware of the fact that we are asking questions.

(2) We should challenge the questions we are about to ask.

(3) We should examine carefully the various sorts of questions available to us and the types of questions we personally tend to use.

(4) We should consider alternatives to the asking of questions.

(5) We should become sensitive to the questions the client is asking, whether she is asking them outright or not.

Dr. Benjamin's pet peeve is the "why" question. The word "why," he says, "connotes disapproval, displeasure. Thus when used by the interviewer, it communicates that the interviewee has done 'wrong' or behaved 'badly.' Even

don't have enought confidence to think that other people will accept me for what I really am, and, as a result, try to be something that I am not."

Here is a corrective prescription from counselors in other disciplines, especially the so-called "non-directive" counseling disciplines: This is called "active listening." Sit down with someone you can talk to, and try reflecting back to him what he says to you. A simple device is to say, when he pauses: "You are saying THIS about THAT." Let him correct you if your reflection is wrong. Try to get into the feeling behind what he says—make that feeling your own—as well as the words themselves. And try to make the words your own; reflect what *he* means, in *your* words. It would be interesting to see what would happen if lawyers interviewed using that style instead of questions.

## Things to Look for in Interviews

Interview answers tend to fall into patterns that tell more than their content—a bit like the gestalt theory of figure and ground. The context is a source of information. Examples:

**Association of ideas:** Part of this is a matter of gathering information, and avoiding interference. The interference part of idea association is a matter of the interviewer's being aware of her own associations; "when the client mentions . . . lying, divorce, a grandmother, there may be started in the interviewer a stream of association which has little to do with the client's feelings about these things," Dr. Garrett says.

**Shifts in conversation:** These may be defensive, as when the client has touched on something he doesn't want to talk about any more (in which case, assuming the topic is relevant, it may be best to make that observation to him); they may also indicate an association.

**Opening and closing sentences:** First words, Dr. Garrett says, may tell most about the client's agenda in the interview; and last words may tell most about the way he feels about his relationship with the interviewer.

**Theme songs, recurrent references:** A man's references to his wife, in an interview about the purchase of real estate, may tell the interviewer that the state of the client's marriage is a central concern in matters of investment. "Talking in circles" may tell the interviewer that, for some reason, the client may not want to get down to the business at hand. This occurs frequently in will interviews. The client does not want to talk about his death and his widow and orphans; he wants the lawyer to *lead* him into those subjects.

**Inconsistencies and gaps:** Contradiction may indicate that the client is experiencing troublesome feelings about the subject being discussed—guilt, maybe, or confusion or ambivalence. What is left out or expressed inconsistently is probably what is most important to the client. "A woman may discuss in great detail certain difficulties she has been having with the children but say nothing about her husband. The significance of such gaps or inconsistencies often becomes clearer through their cumulative force. One such occurrence may suggest a barely possible interpretation. But if then others confirm this hypothesis, it is no longer a mere possibility. . . ."

**Concealed meaning:** A boy who says he doesn't like baseball may be saying that he is suffering from a lack of friends (Dr. Garrett's example); a businessman who protests that he only "wants to do the right thing" in litigation may feel guilty because he wants to do the wrong thing. Or—the commonest of all commercial examples—as Abe Martin said, "Whenever anybody says to me 'It's not the money, it's the principle of the thing,' it's the money."

## Principles

Dr. Benjamin is eloquent in his insistence that a personal ethic of counseling, a principle of professional service, is likely to be the most potent factor in anybody's interview style. An indication of egocentric legal counseling is the recurrent tendency to speak of clients in terms of problems. What does it tell me about my ethics, my interviewing

principle, that I think of a new *problem* rather than a new *person* when a client walks in the door?

One possibility is that my use of that word—and, more important, of that attitude toward clients—in my bid for control. Dr. Benjamin's experience, for example, is that the most important talent for starting an interview is the ability to stay out of the way. The client will probably not even hear what the interviewer says at the beginning; he is anxious to get started.

Dr. Benjamin—and, I suspect, most effective legal counselors—believe that the best source for learning an interview technique is one's own experience. This kind of learning, like all other kinds, does not just happen. A learning lawyer listens to what she says and does; she talks about it with people who care about her; she develops and practices a basic, positive, acceptance of herself. She is helpful because she believes that what she says and does and cares about has value. Dr. Benjamin suggests a few more specific guideposts for evaluating interviews:

(1) Did you help the interviewee open up his perceptual field as much as possible? Was he able to look at things the way they appear to him?

(2) Did you help him move from a external frame of reference? (Suppose—Dr. Benjamin's example—that the client says, "I know it is wrong to steal." What is the effect of the lawyer's then asking, "Why did you do it, then?")

(3) Did you help him to explore the subject in his way, or did you lead him to where *you* wanted him to be?

Another of my students in legal counseling made a rather melancholy observation about lawyering principles which says it better than psychologists or law professors can:

> "From my observation of attorneys representing their clients, I continue to wonder if these attorneys are really acting in their clients' behalf. By this I mean that when a client comes into your office . . . he comes . . . realizing that you possess certain tools which he does not possess,

and he hopes that somehow you will be able to use those tools to his advantage. But I often wonder if we use these tools to his advantage or to our own. It strikes me that many times attorneys forget that they are representing their clients. The client is someone who has given them the opportunity to improve their personal positions."

## Nonverbal Communication

Miguel de Unamuno, through his character St. Immanuel the Good, said "We should concern ourselves less with what people are trying to tell us than with what they tell us without trying." One way to begin to develop the difficult skill of listening nonverbally, of observing the way the client is presenting himself, is to characterize broadly. Does he act as though he were visiting a doctor? Is he treating me the way he probably treats business colleagues? Does he seem to be wary, as if he were talking to someone he does not trust? Another way to approach this skill is to look for specific clues. I suspect that a successful personal method of observation involves both approaches.

Dr. Garrett emphasizes the more obvious nonverbal clues—tenseness, rigid posture, clenched hands, pallor, as well as the things one can observe (dress, physical condition, gait) which talk about the client's life.

There is a danger, of course, in not seeing where the line is between you and me, when I set out to discern what you tell me without trying. I am, as Dr. Garrett says, "limited by [my] interests, prejudices, attitudes and training. . . ." I may distort the data. She used an exercise in her social-work classes to point this up and to develop an awareness of it:

"Students are asked to write in not more than one page an observation they have made of an individual or a group of individuals. The observation may take place in a restaurant, at a railroad station, on the street, or on the campus. Students are asked to perform this experiment in pairs; two students observe the same scene and write it up without comparing notes. . . . Such a project

> is unusually convincing in illustrating the subjective variations of the observer. Sometimes the write-ups are so different that the students cannot believe they are of the same situation. In one an individual is described as angry, callous to the pleas of his child for an ice-cream cone. In the other he is reported as anxious, uncertain, indecisive, frustrated, and helpless in the face of a demanding off-spring in a temper tantrum."

When I discover these distortions in observations I have set an agenda for self-analysis. Where do the distortions come from? Here is a clue: Henry Murray studied the literature on what psychoanalytic theory calls "displacement" or "transference," and decided that the concept was too limited. He treated the same phenomenon as a system of distortion. If I can locate the source of distortion, and fit that awareness into my interviewing equipment, maybe I can correct for it, as a pilot might correct for a cross wind.

Some of the research on "body language" carries a bit of encouragement for psychological amateurs, who may with good reason wonder if we have to study psychiatry in order to practice law. The recent research suggests that accurate nonverbal communication comes across more or less in wholes, not in parts. We receive nonverbal signals most accurately when we receive them in broad, nonverbal impressions of our own. Examples occur at the beginning of this section: What is my client's physical attitude toward me? Does he act as if he were here to see a doctor? An undertaker? A principal in school? His father? His friend? Someone he would like to be his friend? This research suggests that the best way to get good nonverbal communication going is to be aware of what my own nonverbal attitudes are. What am I saying, for instance, when I put the client on one side of the desk and myself on the other, with all of the apparatus of lawyering and mastery on *my* side and bare desk or, at best, an ashtray, on hers? What am I *feeling* when I keep my hands writing and my notes in front of me and my eyes down most of the time? How would it feel, and what would it say, to move around to the other side of the desk? Or to throw the yellow pad

away? What would happen if I interviewed my client in *his* place instead of mine?

## Evaluation

A key risk for lawyers (and other "estate-planning" professionals) is that they will confine the client, deny him freedom in providing information (and, later, in making choices). We lawyers tend to be moralistic people; we find it hard to be accepting. There are even respectable professional voices which say we *should* be the consciences of our clients. But, in my view, the main argument against being evaluative is that evaluation of my client denies him some of his humanity and forecloses the possibility that he and I may be able to grow together in our relationship. As Carl Rogers says:

> "The major barrier to mutual interpersonal communication is our very natural tendency to judge, to evaluate, to approve or disapprove the statement of the other person. . . .
>
> "The stronger our feelings the more likely it is that there will be no mutual element in the communication. There will be just two ideas, two feelings, two judgments, missing each other in psychological space. I'm sure you recognize this from your own experience. When you have not been emotionally involved yourself, and have listened to a heated discussion, you often go away thinking, 'Well, they actually weren't talking about the same thing.' And they were not. Each was making a judgment, an evaluation, from his own frame of reference. There was really nothing which could be called communication in any genuine sense. This tendency to react to any emotionally meaningful statement by forming an evaluation of it from our own point of view, is, I repeat, the major barrier to interpersonal communication.
>
> "But is there any way of solving this problem, of avoiding this barrier? I feel that we are making exciting progress toward this goal and I would like to present it as simply as I can. Real communication occurs, and this

evaluative tendency is avoided, when we listen with understanding. What does this mean? It means to see the expressed idea and attitude from the other person's point of view, to sense how it feels to him, to achieve his frame of reference in regard to the thing he is talking about."

Evaluative communication seems to plug into all of those hidden feelings of guilt and worthlessness that each of us learned to feel in childhood. There is a part of us which says, in Dr. Thomas Harris' phrase, "I'm *not* okay," and that part of a client may be what a good lawyer can help overcome, so that freedom, growth and choice, and real communication, are possible. As Dr. E. H. Porter, Jr., put it:

"The actions and attitudes of others do hold implications for another as to his value as a person. Very often these implications are conflicting in their positive and negative tones. They may be very subtle and hard to recognize but they are there for us to seek out.

"It is not so certain, however, that just because various lessons by implication are inherent in a situation they will be learned by the person toward whom they are directed. Several factors are apparently involved. One factor is the body of lessons which a person has already learned, how he already feels about himself. We are all familiar with the person who feels himself inferior no matter how much we try to reassure him and try to point out his strengths. We are also familiar with the person who seems to go right on feeling confident despite experiences which would seem nearly catastrophic failure to most of us."

What may be happening in evaluative counseling is an experience which revives feelings of guilt, worthlessness, and stupidity, and *confirms* them—what Porter calls a "proving experience":

"By a proving experience is meant an experience which tends to confirm the impression set in the psychological atmosphere. To illustrate the concept we might think of a five-year-old boy who says to his mother, 'I'll

help you clear the table, Mother. I'll carry out the dishes.' Should the mother doubt his adequacy and competency and express her feelings, we might expect her to reply, 'No! Well, OK. But do be careful and don't drop them.' If at this point Johnny stumbles on that skate he left by the stove and the dishes do fall and break, it is much harder to deny that his mother wasn't right in her feelings. Such an experience tends to prove the implications of her attitudes as to his inadequacy and incompetency."

## Feedback

My students and I have discovered some subtle dangers in the development of an accepting attitude toward clients. The most prevalent of these is that the counselor will find himself saying so little to the client in the interview stage that the client begins to wonder what is going on. (The self-awareness issue for us is this: How do I come across when I am not talking? The answers are often startling: When I keep my mouth shut, people think I disapprove of them, or am judgmental or bored.)

The answer to the danger, and an important technique for advancing the interview, is feedback. Feedback, at the interviewing stage, is a matter of checking information, synthesizing, making sure what has been received is accurate, and being open about the doubt or confusion which is experienced by the counselor when what she hears sets off strong feelings within herself.

The manner in which feedback is presented, though, makes all the difference in the world in terms of whether it bogs the interview down, or just keeps it going, or moves to new levels of candor and accuracy and completeness. Here are some useful suggestions for effective feedback, based in part on outline suggested by points in the old National Training Laboratory's Institute for Applied Behavorial Science:

### Feedback Should Describe, Not Evaluate

The difference, in terms of result, is that the client will feel free to use nonevaluative feedback according to his own best lights. If one pursued that idea in law practice he might decide that the traditional ideal of lawyer independence is overblown, or at least misapplied.

### Feedback Should Be Specific

"John, you're trying to dominate me" may be a true observation, but it is less likely to be acted upon than, "John, just now, when you and I were discussing your life insurance, I had the feeling you were not listening to me. I had the feeling, just then, that you wanted me to agree with you, regardless of what I thought." (But see, just below, the section headed, "Feedback is checked.")

### Feedback Should Take Needs Into Account—Needs of Client as Well as Needs of Counselor

A lawyer acts, in the nature of things, from a position of enormous interpersonal power. And pushing people around gets to be fun; it can be used for pure recreation. We all know an occasional sadistic lawyer who uses his influence over clients, and junior colleagues, and clerks in public offices, for entertainment. Paradoxically, though, a person cannot move toward action with sensitivity for others until she recognizes and accepts the demands of her own needs.

### Feedback Should Be Directed Toward Behavior the Client Can Change

It won't do anything but injury to tell a client that he is stupid or evil or old or infirm. What is usually involved when a "helping person" takes that tack, of course, is a misdirected *aggression* in the *counselor.* Compare the classic model of a Socratic law teacher, who abuses law students, perhaps because he lacks enough status or enough opportunity to abuse his professional peers as much as he wants. Another side of destructive feedback is that it is

usually a misperception. The client I perceive as impotent because old or infirm may simply be coming across that way. He may, out of some need of his own, be trying to appear old and infirm; that may be *his* manipulative device ("poor little me"). If that is so, and I am perceiving accurately, it may do him a world of good to have the benefit of my perception, if I can give it to him without appearing judgmental.

### Feedback Is Best When Solicited

Not all law-office situations imply a desire in the client for honest reaction—but many do—and the best feedback comes to him who wants it and says so. Another and more helpful way to put the point is that the most useful reaction is in terms of a question that the client asks for himself. I must say, for myself, that it often takes courage to answer questions such as "Do you think I'm being selfish?" or "Does it seem to you that I'm fooling myself about the matter?" or "Do I seem to you to be vindictive?" The trick is to have the courage to deal with that sort of question honestly, to deal with it in a way that leaves the client free to act, and to help him without making him dependent on me.

### Feedback Should Be Well Timed

The time to answer interpersonal questions (like those above) is when they are asked. That's when the counselor's reaction is most honest. Delay suggests evaluation.

### Feedback Is Checked

An honest reaction, based on an immediate perception, may for all its candor be wrong. One way to find out, consequently to keep personal channels of communication intact, and to guard against evaluative feedback, is to ask if the perception seems right to the client: "Yes, I have a feeling that you are being vindictive. Does it seem that way to you, too?"

## Lawyer Presence

In an interpersonal sense, it is possible for a lawyer in an interview to be literally not even present, out of the room. It is not only possible; it's easy. We do it all the time by, for example:

(1) carefully confining ourselves to what is *relevant* in what clients say, so that nothing even hits our mental tape recorders unless it fits our "theory of the case."

(2) listening for the "key facts" which will fit our will forms and not hearing anything else.

(3) confining our professional attention only to facts that fit our categories, our magic fingerless typewriters, or our understanding of the Code.

We do that because somewhere inside we have decided that lawyering is a game and we mean to win it. These barriers to listening are, in other words, *defense mechanisms* caused by our lawyers' fear to test our abilities, our knowledge, or our prearranged professional structures. They may in fact be defense against threats which are even deeper, even harder to get at, even more disruptive.

One might begin an analysis of lawyer presence where Dr. Alfred Benjamin's fine little book ends. These are the issues Benjamin sets for "the helping person," with a fine existential wave of the hand. "How we meet them today need not be the way we shall meet them tomorrow. The choice is ours":

(1) Shall we allow ourselves to emerge as genuine human beings, or shall we hide behind our role, position, authority?

(2) Shall we really try to listen with all our senses to the interviewee?

(3) Shall we try to understand with him—empathically and acceptingly?

(4) Shall we interpret his behavior to him in terms of his frame of reference, our own, or society's?

(5) Shall we evaluate his thoughts, feelings, and actions and if so, in terms of whose values: his, ours, or society's?

(6) Shall we support, encourage, urge him on, so that by leaning on us, hopefully he may be able to rely on his own strength one day?

(7) Shall we question and probe, push and prod, causing him to feel that we are in command and that once all our queries have been answered, we shall provide the solutions he is seeking?

(8) Shall we guide him in the direction we feel certain is the best for him?

(9) Shall we reject him, his thoughts and feelings, and insist that he become like ourselves or at least conform to our perception of what he could and should become?

## Conclusion: The Good-Faith "Malpractice Crisis" and What It Could Mean

The legal profession has come of late to worry about its "malpractice crisis" and to adapt its law-office procedures and its human relations toward the defensive practice of law. Legal malpractice, whether it is a "crisis" or not, ties into the subject of this essay because it has to do with tragic failure in a useful professional relationship. That is, the real concern in most of what is written about malpractice (and my concern, too) is that a lawyer will get into trouble when he is acting in good faith. The literature avoids discussion of the risks of being dishonest or incompetent—and it should. The focus of discussion is good-faith malpractice.

It seems to me that the psychological and moral heart of good-faith malpractice is the professional's assumption that his relationship with his client rests on the consent of the client. That assumption is incorrect, I think. The professional relationship does not rest on *consent* but on *mutuality.*

The conventional advice to professionals is that the best prevention for malpractice is a good relation with the client. I remember, years ago, giving a talk to the state osteopathic association in which I made this point—with a quotation from a medical-malpractice texbook: "Malpractice suits are not started by patients who are on friendly terms with their physician. Patients who start lawsuits have usually been alienated personally . . . (by) . . . tactless behavior . . . arbitrariness, arrogance, discourtesy, (and) displays of irritation . . . It is fairly easy for him to develop a desire to teach the physician a lesson."

That is a picture of a fractured human relationship. It is not a situation which would have been cured by the *consent* of the patient, by some sort of *contract.*

The difference I am talking about is philosophically fundamental. Contract thinking in our tradition goes back to our revolution and to the view that a human being is a lonely, regal figure who gives up some of his independence in return for allies against enemies who are bigger than he is. The regal figure who enters into this sort of "social contract" is active when he signs on and when he finally rebels against his protector; in between those crisis times he is passive and dependent. At every point in the relationship he has only one choice: to do what he is told or to find a new protector.

Our religious traditions have always been in tension with the contract notion of human relationships. The Puritan fathers believed in covenants between people, in interdependence and mutuality—not in contracts. The basis of their thinking was the covenant between God and His people—and the idea of a *contract* with God would be blasphemy. The Christian and Jewish idea is that we need one another because God made us that way, not because we have been forced to make agreements to protect our lonely individuality. The Christian and Jewish idea is that we are called to love one another, even in professional relationships. The great Jewish theologian Martin Buber taught that human relationships are the way we fathom the silence of God: "I become aware of him," Buber said of

that other person, the one we call *client,* "aware that he is different from myself, in the definite, unique way which is peculiar to him, and I accepted whom I thus see . . . I can recognize in him, know in him, more or less, the person he has been . . . created to become."

The better advice for the practical prevention of malpractice actions comes from those who, consciously or unconsciously, invoke our religious tradition. Part of the reason is legal; professional relationships are fiduciary. Clients are seen as the influenced parties, not the influencers; their attempts to consent are *legally* suspect. But the more fundamental reason is that people *cannot* agree *never* to become annoyed, dissatisfied, or disappointed. What we do instead—and we do this every day, with our spouses, our children, our law partners—is agree to be faithful, to try our best to endure and forgive and live above the level of our resentments.

All of the really useful suggestions on building and maintaining relationships depend, I think, on seeing relationships as more a matter of faithfulness than of contract, more a matter of caring for the other than of merely keeping our promises to him.

If you begin with this ethical orientation it is possible to make sense out of our ancient professional tradition of gratuitous service and, from there, to make sense of the so-called practical suggestions for better relations with clients. The ancient tradition of gratuitous service is that we work for our clients because they need our help, and not in order to be paid. It always sounds naive and professorial when I say that to students, but the tradition was not invented by professors. In the earliest beginnings of the advocate in Anglo-American law, trial by combat in the 12th century, it became possible for a litigant to have someone who was adept at fighting to take place in the trial. But the champion was not allowed to accept payment; in fact he was severely punished if he was caught accepting payment. The idea was that he was in the battle because he and his client were involved in a joint venture, a mutual

undertaking, something too precious and important to be sullied with payment.

Of course, we lawyers are paid now, but we like to think there is something about our professional dedication to our clients that cannot be bought. There is, and ought to be, something left of that ancient ideal, and that something is what I am calling the ideal of mutuality, of faithfulness, which ideal is opposed to ideas of contract and consent in lawyer-client relationships.

That moral notion is a way to understand some of the practical suggestions: For instance, one problem in professional relationships is that professional and client tend to compete. People do not like being dependent, and when professionals (perhaps unconsciously) force them to be dependent, they fight back (perhaps unconsciously). People don't like being put down in law offices by waiting rooms which are designed to impress them with the lawyer's superiority, or by always having to act and react according to the lawyer's convenience, by having to sit in the more modest chair, by having the sunlight from the window in their eyes, not the lawyer's, by having to agree to steps they don't understand, by leaving all of the strategy and all of the work up to the lawyer.

For another instance, self-reliant, adult human beings do not like being treated as if they were children. Youngsters tend, as we parents know, to rebel against their parents, and they do this both when they are adolescents, and then, throughout their adult lives, against those who propose to remind them of their adolescence. Clients should be partners; all of the psychological evidence I have seen indicates that deep down they really *want* to be partners.

You can make a contract to be a passive competitor, or to be a child, but you are not likely to find the contract comfortable when the going gets rough. A person is simply more committed to a venture, and less likely to rebel, when she is in the venture with a *partner,* who says to her, "What do you think we should do about this?" than when her participation is limited to saying "okay" to some wise papa's ideas and initiatives.

We couldn't get along with our spouses or our partners if we hadn't undertaken to forgive them for God knows what. I am suggesting that good legal counseling, and the only useful malpractice-prevention strategy, rests on that same philosophy.

## Reference and Reading Suggestions

### General Theory

The philosophy behind interviewing suggestions developed here is, for the most part, drawn from modern humanistic psychology. There are three small textbooks available in legal interviewing and counseling—Andrew Watson's *The Lawyer in the Interview and Counseling Process* (1976); the current edition of David Binder's and Susan Price's *Legal Interviewing and Counseling* (1977); and James R. Elkins' and my *Legal Interviewing and Counseling in a Nutshell* (2d ed. 1987). Three chapters in my *The Planning and Drafting of Wills and Trusts* (2d ed. 1979) are devoted to interviewing and counseling; Dr. Robert Redmount's and my book, *Legal Interviewing and Counseling* (Matthew Bender, 1980), includes several chapters on estate-planning situations. Louis Brown's and Edward Dauer's casebook *Planning by Lawyers* (1978), has one lengthy chapter on counseling and a great deal of other useful material on what they call "non-adversarial" law practice. In addition to these sources on the legal profession there are a few good books on counseling as an activity which cuts across professional lines. I have a strong preference for the work of Carl Rogers, especially *On Becoming a Person* (1960) and *Client-Centered Therapy* (1965). Rogers is the founder, in psychology, of nondirective counseling; a more methodological treatise on that system is Porter's *An Introduction to Therapeutic Counseling* (1950). And a superb little book in this school is Simons and Reidy, *The Human Art of Counseling* (1972). I find useful a number of books which are more like textbooks than Rogers' books are, and more eclectic in the styles of counseling they suggest. The current edition of Tyler, *The Work of the Counselor* is one of the best. I also recommend (and

use in this paper) Garrett, *Interviewing* (1942); Benjamin, *The Helping Interview* (1969); and Kinsey, et al, *Sexual Behavior in the Human Male* (1948). Professor Harrop Freeman's *Legal Interviewing and Counseling* (1964) is a casebook which is useful reading; a revised edition of that casebook done with Professor Henry Weihofen, was published in 1972.

## Client Feelings

It is important to gather some general orientation on client feelings in the professional enterprise. In "estate planning," I believe, these are most likely to show up as feelings about death; feelings about property; and feelings about loved ones, living and dead. There is an immense literature on death attitudes; the first significant book in the field was Dr. Herman Feifel's anthologies, *The Meaning of Death* (1965) and *New Meanings of Death* (1977); a more recent and quite popular volume is the current edition of Kubler-Ross, *Death and Dying.* I have concerned myself in my own work (see below) with these feelings in "estate planning" clients, and with attempting to fill the void left by behavorial science in information on attitudes toward property. For the not-infrequent situation in which the "estate-planning" client comes to a lawyer soon after the death of someone close to him, it is useful to look into the literature on bereavement and grief. I recommend (on both death attitudes and bereavement) Fulton's anthology, *Death and Identity* (1965), and, on bereavement, Parkes, *Bereavement* (1972).

## Self Awareness

I am serious about my recommendation that lawyers consider training in some form of human relations groups. I have been struck by the fact that not very many lawyers have tried that avenue to self-awareness, and by my own positive experience in groups (as a participant and as a group leader); I would include here groups of lawyers and law students ("cousin groups" as the professionals call them) and groups more casually formed ("stranger

*Drafting Wills and Trusts* (1979) is on counseling in the "estate planning" practice, and about feelings on death and property. Some recent periodical work related to these efforts:

"Estate Planning Games," 47 *Notre Dame Law* 865 (1972), condensed and reprinted in *The Monthly Digest of Tax Articles* 44 *(Aug 1972);*

"Models for the 'Estate Planning' Counselor," 6 *Estate Planning Institute* (1972).

My contribution to the 1973 Estate Planning Institute contained more detail on the analytical framework suggested by the functions of interviewer, counselor, decision-maker, and problem-solver. My contribution to the 1985 Estate Planning Institute (Ch 15), "On Being Pleasant: Ethics in Estate Planning," is a philosophy (theology) of the art based on Elwood P. Dowd, hero of Mary Chase's play "Harvey." Professor Brown and I have written a theoretical background article on this sort of thing, entitled "Toward a Jurisprudence for the Law Office," in the 1972 volume of the *American Journal of Jurisprudence.*

groups"). It is of course important to select a program which is responsible and which provides competent group leaders. (Doctoral degrees in medicine or psychology are, by the way, no guarantee of competence, and the absence of them is not a reliable way to detect incompetence.) My own experience has been with the Center for Studies of the Person, LaJolla, Calif.; the N.T.L. Institute for Applied Behavorial Science; and the International Academy of Applied Social Scientists. If one wants to begin by reading:

Howard, *Please Touch* (1971) (on groups);

Berne, *Games People Play* (1964); Harris *I'm Okay, You're Okay* (1969); and James and Jongeword, *Born to Win* (1971) (all on transactional analysis);

Perls, *et al, Gestalt Therapy* (1951);

N T L Inst, *Reading Book, Laboratories in Human Relations Training* (1971 ed).

Shostrom, *Man the Manipulator* (1968).

The suggestions for reading in Elkins' and my *Nutshell on Legal Counseling.*

## Nonverbal Communication

Most of the literature is either turgidly scientific or hopelessly vague. There is a good deal of useful research in the first category, and, of course, Fast, *Body Language* (1970) in the second. My problem with Fast is that he talks and illustrates and leaves me with nothing I can use. The research I refer to in the text is in a fine, readable article, Mahl, "Lectures and Body Movements in Interviews," 3 *Psychotherapy* 295 (1968).

## Author's Work

My texts are *Legal Interviewing and Counseling in a Nutshell* (2d ed, 1987 with James R. Elkins), and (with Dr. Robert S. Redmount), *Legal Interviewing and Counseling* (1980). *My Death, Property and Lawyers* (1970) is about client feelings in "estate planning," particularly about feelings on death. The first three chapters of my *Planning and*